UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

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December 11, 2008

TO: All Recipients of the Captioned Decision
RE: BAP No. WO-08-036, In re Thomas
Filed October 14, 2008; Hon. Mark B. McFeeley, authoring

Please be advised of the following correction to the captioned decision:

Page 3, footnotes 4 and 5: delete the words “her sister.”

Page 6, second full paragraph, first sentence: The phrase “April 9, 2008” is amended to read “May 12, 2008.”

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By: Stephanie Freeman
Deputy Clerk

FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
October 14, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SHIRLEY LEVINGSTON THOMAS, also known as Shirley Ann Thomas, also known as Shirley L. Thomas, Debtor.	BAP No. WO-08-036
HARMON FAMILY TRUST, Plaintiff – Appellee, v. SHIRLEY LEVINGSTON THOMAS, Appellant, and JOHN D. WAGNER, Defendant.	Bankr. No. 07-10442 Adv. No. 07-01087 Chapter 13 OPINION*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, BROWN, and KARLIN, Bankruptcy Judges.[1]

McFEELEY, Chief Judge.

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* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtor/Appellant Shirley Levingston Thomas ("Debtor") appeals three orders entered by the bankruptcy court for the Western District of Oklahoma.[2] The only basis for the appeal of all three orders is the Debtor's argument that the bankruptcy court did not have the jurisdiction to award attorney fees as sanctions against the Debtor after it remanded the underlying adversary proceeding to state court. Because we conclude that the bankruptcy court retained jurisdiction to award attorney fees as a sanction for a frivolous action, we AFFIRM.

I. Background

This case originated as a state court case between Elsie W. Harmon as Trustee of the Plaintiff/Appellee Harmon Family Trust ("Harmon Trust") and Defendant John D. Wagner ("Wagner"). On July 24, 2006, the Harmon Trust filed a complaint based on fraud, embezzlement, and false pretenses in the District Court of Oklahoma County against Wagner. On September 29, 2006, the district court judge granted the Harmon Trust's motion for summary judgment and awarded the Harmon Trust $551,699.34 and the return of certain real estate. Debtor was not a party to this action. At the time, the Debtor lived in the aforementioned real estate; subsequently, the Debtor was evicted from said premises.

Five months later, claiming that she had an interest in the state court case, on February 7, 2007, Debtor filed an Answer and Counterclaim in the state court case. In June 2007, the state court found that the Answer and Counterclaim filed by the Debtor was an improper, unauthorized attempt by a non-party to become involved in a case that had become final.

Meanwhile, on February 21, 2007, Debtor filed a petition pursuant to

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[2] Although the Debtor listed four orders in her notice of appeal, two of those orders are identical. The bankruptcy court clerk's office inadvertently entered one order twice. *See* "Order Sustaining Objection and Granting Motion to Strike," both entered on the bankruptcy court docket on February 15, 2008, at 10:43:02 as entry #83 and entry #86.

Chapter 13 of the Bankruptcy Code. On April 26, 2007, her bankruptcy case was dismissed because the Debtor did not appear at the 341 meeting.

Notwithstanding the recent dismissal of her Chapter 13 case, the Debtor initiated an adversary proceeding on May 24, 2007, and filed a Notice of Removal Pursuant to 28 U.S.C. § 1452 and Federal Rules of Bankruptcy Procedure Rule 9027 ("Second Removal Action") of the state court case.[3] The Harmon Trust objected and requested sanctions for an ongoing abuse of process.

On June 27, 2007, the bankruptcy court heard the motion and objection and sustained the objection, finding in pertinent part: the Removal Action was deemed dismissed as of the date of the dismissal of the Debtor's bankruptcy case; the Removal Action was not brought by a party to the state court case as required by statute; and the Removal Action was barred by res judicata. The court entered an order that remanded the case to Oklahoma state court.[4] The court declined to impose sanctions.

On July 9, 2007, the Debtor filed a timely Combined Motion for Reconsideration Under Fed. R. Civ. P. 52, 59, and 60 Incorporated by Fed. R. Bankr. P. 7052, 9023, and 9024 with Brief in Support Thereof *Sans* Hearing ("First Combined Motion"). In an Order entered on July 31, 2007, after a hearing

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[3] This was Debtor's second attempt to remove the case. Debtor had previously filed under Chapter 13 and then filed an adversary proceeding on October 14, 2005, to remove the state court case to the bankruptcy court. The bankruptcy judge entered an Order for Remand on January 9, 2007, as the Debtor's bankruptcy case had been dismissed eleven months before the removal action. In this case, as a basis for removing the case to the bankruptcy court, the Debtor asserted that the state court action violated the automatic stay relative to Judith W. Davis, who filed under Chapter 13 of the Bankruptcy Code on July 13, 2006, case number 06-11612 (the "Davis bankruptcy"). The Debtor asserted that her bankruptcy rights had also been violated by her forcible ejection from the real estate at issue in the state court case.

[4] The court also found that the Debtor was collaterally estopped from bringing the adversary proceeding because the same issues had been addressed in a Motion for Remand filed in adversary proceeding 06-01360 during the Davis bankruptcy, which was granted by the court on November 9, 2006.

on that same date, the bankruptcy court denied the First Combined Motion.

The Harmon Trust renewed its request for attorney fees. In an Order Sustaining Second Order of Remand, the court granted the request and ordered attorney fees in the amount of $2500.

On August 9, 2007, the Debtor filed a Combined Motion to Alter or Amend Order for Compensation Pursuant to Fed. R. Civ. P. 52 and 59 as Made Applicable to Bankruptcy Proceedings Pursuant to Fed. R. Bank. P. Rules 7052 and 9023 ("Second Combined Motion"). As the Second Combined Motion appeared to focus on the award of attorney fees and not on the underlying Remand Order, on August 22, 2007, the bankruptcy court transferred the case to state court.

The bankruptcy court set September 11, 2007 to hear the Second Combined Motion. On August 31, 2007, the Debtor filed a Motion to Continue Hearing Set for the 11th day of September 2007 ("Motion to Continue"). In the Motion to Continue, the Debtor argued that the bankruptcy court did not have jurisdiction to award sanctions because the adversary proceeding had been dismissed and/or remanded. The bankruptcy court denied the Motion to Continue in an Order Denying Motion to Continue Hearing entered September 5, 2007.

On September 6, 2007, the Debtor filed a Special Appearance and Motion to Dismiss Continuing Post-Judgment Earnings Garnishment Summons for Lack of Jurisdiction Sans Hearing ("Motion to Dismiss").

On September 10, 2007, the Debtor filed a L.R. 7052 Request for Ruling En Banc Sans Hearing Special Appearance and Motion to Strike Hearing Set for 9/11. On that same day, three bankruptcy judges entered an order denying the Debtor's request.

On September 11, 2007, the bankruptcy court heard the Second Combined Motion. The Debtor did not appear. The Harmon Trust asked for additional

attorney fees, which the bankruptcy court granted in the amount of $1500.

In the meantime, on August 22, 2007, the attorney for the Harmon Trust had filed a Garnishment Affidavit seeking garnishment of funds from the Debtor's employer to be applied against the attorney fees judgment. On September 6, 2007, Debtor filed a Special Appearance, Claim for Exemption of All Funds Pursuant to 31 O.S. § 1.1 and Request for Hearing.

On September 17, 2007, the court heard the Claim for Exemption. The Debtor did not appear. The court orally denied Debtor's claim for exemption on the following grounds: the Debtor did not establish the requisite hardship, and the Debtor did not have any dependents and so was not eligible to claim the exemption. Because the Debtor did not present any evidence of hardship and did not appear, the court found her claim frivolous and awarded the Harmon Trust costs and attorney fees in the amount of $750.00. The ruling was memorialized in an Order entered on September 18, 2007.

On October 11, 2007, the bankruptcy court denied the Debtor's Motion to Dismiss the continuing garnishment. The bankruptcy court further found that the attorney fee award was not part of the state court action and the bankruptcy court retained jurisdiction to hear and decide matters arising from the Debtor's conduct during the bankruptcy court proceedings. The court further found that Debtor had made numerous frivolous filings and failed to appear in prosecution of the frivolous filings and so awarded the Harmon Trust's attorney $500 for costs incurred in defending against the above motion. Also on October 11, 2007, three other orders were entered denying Debtor's various demands for en banc relief relative to other determinations of the court. On November 27, counsel for the Harmon Trust filed another Garnishment Affidavit.

On December 18, 2007, the Debtor filed a Special Appearance and Answer to Garnishment Affidavit, Counterclaim, and Cross-Claims. The Harmon Trust

objected to and moved to strike Debtor's answer on January 3, 2008. By minute order, the bankruptcy court struck Debtor's answer. On February 15, 2008, the bankruptcy court entered an Order Sustaining Objection and Granting Motion to Strike.

On February 19, 2008, the Harmon Trust filed a Motion for Allowance of Attorney's Fees and Reimbursement of Expenses ("Motion to Compensate"), to which the Debtor filed an Objection. On March 26, 2008, the bankruptcy court granted the Motion to Compensate, overruling the Debtor's objection.

On April 3, 2008, the Debtor timely filed a notice of appeal. Subsequently, on May 12, 2008, this Court granted leave to appeal, concluding that the remand order was final and thus, the fee order was also final. The parties have consented to this Court's jurisdiction because they did not elect to have the appeal heard by the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

II. Discussion

This appeal purports to appeal three orders: the January 3, 2008, Docket Entry #73 - Minute Entry that reads "Order of the Court: Stricken;" the Order Sustaining Objection and Granting Motion to Strike entered February 15, 2008; and the Order Granting Motion for Allowance of Attorney's Fees and Reimbursement of Expenses entered March 26, 2008. No other orders are appealed here. The only basis for these appeals is the Debtor's contention that after the bankruptcy court remanded the proceeding to state court, it lacked subject matter jurisdiction to award attorney fees.[5] Jurisdictional questions are reviewed de novo. *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1544 (10th Cir. 1996).

The bankruptcy court did not state on which basis it was relying when it

[5] Significantly, Debtor does not challenge either the amount of the fees awarded or the process used by the court in awarding those fees.

awarded these attorney fees. There appear to be three means by which the bankruptcy court may have assessed these fees and costs: 28 U.S.C. § 1447(c); Federal Rule of Bankruptcy Procedure 9011; and 11 U.S.C. § 105(a). *In re DeVille*, 361 F.3d 539, 545-46 (9th Cir. 2004).

First, a court may award fees and costs as a result of improper removal under 28 U.S.C. § 1447(c). Section 1447(c) is a fee-shifting statute entitling the prevailing parties to recover attorney fees. *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

Under Federal Rule of Bankruptcy Procedure 9011, a court may award "an appropriate sanction" for frivolous motions. Fed. R. Bank. P. 9011(c). Sanctions may be awarded only "after notice and a reasonable opportunity to respond." *Id.* Such a motion must be made separately from other motions. Fed. R. Bankr. P. 9011(c)(1)(A). The court may initiate such a motion if it issues an order to show cause "describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subsection (b)" of Rule 9011. Fed. R. Bankr. P. 9011(c)(1)(B). Because a Rule 11 sanction "requires the determination of a collateral issue: whether the attorney has abused the judicial process, and if so, what sanction would be appropriate[, such] a determination may be made after the principal suit has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (examining Civil Rule 11 which is analogous to Bankruptcy Rule 9011). In other words, even in the absence of subject matter jurisdiction over the principal claim, a court retains jurisdiction to determine whether to award attorney fees. However, none of Bankruptcy Rule 9011's procedures were followed in assessing these attorney fees, and therefore, it does not appear that the bankruptcy court relied on Rule 9011 in assessing the sanctions.

Finally, a court may sua sponte impose sanctions for conduct abusive of the judicial system under its inherent authority under 11 U.S.C. § 105(a). *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994). Section 105(a) provides that a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In *Courtesy Inns*, the Court of Appeals for the Tenth Circuit concluded that sanctions could be assessed under this section when the bankruptcy court found that the bankruptcy filing was "purely for the purpose of delaying the creditor from enforcing its rights." *Id.* at 1090.

As explained in a Ninth Circuit BAP case, *In re DeVille*, under § 105 a court may award compensatory attorney fees to impose sanctions for a pattern of bad faith conduct in removed proceedings. *In re DeVille*, 280 B.R. 483 (9th Cir. BAP 2002), *aff'd*, 361 F.3d 539 (9th Cir. 2004). In *DeVille*, the Bankruptcy Appellate Panel of the Ninth Circuit upheld an attorney fee sanction for filing bankruptcy related removal notices in violation of prior court orders. *DeVille*, 280 B.R. at 494-95. *DeVille* held that such sanctions were within the discretion of the bankruptcy court when the sanction was reasonable attorney fees and costs, and was predicated on the inherent power of the court. *Id.* at 495-96. We agree.

III. Conclusion

For the reasons set forth above, the bankruptcy court is AFFIRMED.